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Editorial

by Sandra Liebenberg

This is the final edition of *ESR Review* for 1999. The SA Human Rights Commission is in the throes of its second cycle of monitoring the realisation of socio-economic rights in fulfilment of its constitutional mandate. Busi Sithole and Zandile Nkonyane of the Commission's Research Department update our readers in this edition on the process being followed. In her article, Gina Bekker highlights the need for more active NGO participation in the monitoring process, and discusses plans for an NGO 'shadow report' on economic and social rights. This report can form the basis of a shadow report to the UN Committee on Economic, Social and Cultural Rights when South Africa finally ratifies the International Covenant on Economic, Social and Cultural Rights. Tseliso Tipanyane, Head of the Commission's Research Department, also discusses the outcomes of an international conference organised by the SA Human Rights Commission on food security and nutrition as human rights.

Our first feature article focuses on developing a coherent interpretation of the concept, 'progressive realisation', used in sections 26 and 27 of the Bill of Rights. Our second feature article highlights how gender-based violence undermines women's full and equal enjoyment of socio-economic rights. In our policy and legislation section, we examine the impact of Government's proposal to make AIDS a notifiable disease on health rights as well as Minister Kader Asmal's plans to improve the accessibility and quality of education in South Africa.

A significant development is the increasing number of cases relating to socio-economic rights issues that are coming before the courts. During the course of this year, the Cape High Court has heard a number of key cases relating to housing rights. Steve Kahanowitz and I review these cases in this edition.

The concluding observations adopted by a workshop held in Lagos on the African Commission on Human and Peoples' Rights and economic, social and cultural rights activism in Africa are published in the 'Events' section.

The contents of this edition of *ESR Review* reveal that there are a number of important developments both within South Africa and the African region as a whole aimed at promoting and giving effect to socio-economic rights. This is encouraging as a sign that economic and social rights are finally beginning to come into their own as fundamental human rights. The challenge for the new

millennium is to ensure that these rights make a real contribution to eradicating poverty and inequality in our society. This will require the adoption of laws, policies, programmes and budgetary measures that give proper effect to these rights and prioritise the needs of vulnerable and disadvantaged groups. In addition, it will require a concerted commitment from all State institutions, the courts, civil society and the private sector to fulfil their respective roles and responsibilities in relation to these rights. We look forward to continuing our efforts to track these developments in *ESR Review* during the year 2000.

Finally, we would also like to take this opportunity to thank all contributors to *ESR Review* during 1999.

'Progressive Realisation' Of Socio-Economic Rights

Shifting The Focus To Outcomes

by Conrad Barbeton

In my previous article ('Paper Tigers? Resources for Socio-Economic Rights', *ESR Review* vol. 2, no. 1, 1999, p. 6), I observed that the South African Constitution is widely regarded as one of the world's most progressive constitutions because of the coverage it gives to socio-economic rights in the Bill of Rights. The article goes on to note that these rights have been framed in such a way as *not* to place an unambiguous obligation on government to fulfil them. This was illustrated with reference to the 'right to housing'. To recap, section 26(1) and (2) of the Constitution read as follows:

26.
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

The concepts of "*adequate* housing" and "the right *to have access to* adequate housing" in section 26(1) are left open to interpretation. Section 26(2) requires that "the State must take" action and in doing so is expected to use its available resources to give real content to the right over time. However, the more important effect of this section is to limit the extent of the 'right to housing'. In this regard the interpretation given to the following concepts are particularly relevant:

- *reasonable legislative and other measures*
- *within its available resources*
- *progressive realisation*

My previous article looked at what "within its available resources" might mean from an economist's perspective. Here I focus on what "progressive realisation" might mean to an economist.

The UN Committee on Economic and Social Rights has interpreted the phrase "progressive realisation" to mean an obligation on the part of the State "to move as effectively and expeditiously as possible to securing its ultimate goal". The Committee went on to note that the phrase "should not be misinterpreted as depriving the obligation of all meaningful content." (UN General Comment No.3 (5th sess.), UN. Doc. E/1991/23, para. 9). Applying this interpretation to the

present example: the State must move as effectively and expeditiously as possible to secure the 'right to have access to adequate housing'. To be blunt, I find this elaboration most unhelpful. What does it mean practically? And to say that the phrase "progressive realisation" should not be used to deprive the right of all meaningful content seems to be stating the obvious. It would be a sad day if the socio-economic rights that the writers of the Constitution took great care to include in the Bill of Rights were to be rendered meaningless by the way courts interpret this single phrase.

Focusing on inputs

How then should the phrase "progressive realisation" be interpreted? One way of approaching it is to focus on the input side of the equation. According to this approach the government must progressively increase the amount of resources it allocates to those programmes that contribute to the fulfilment of socio-economic rights. So the government's budget for improving access to housing should grow each year. Extending this logic means that the government should increase its spending each year in relation to those socio-economic rights that must be progressively realised: i.e. providing access to land, adequate housing, health care services, sufficient food, water, social security and further education. To do this the government would either have to cut expenditure in other areas continuously or increase the level of taxation continuously. Either way this approach to "progressive realisation" is simply not fiscally or economically sustainable.

In addition to not being sustainable, this interpretation is based on the assumption that progressively increasing inputs raises output. In other words, it assumes, for example, that increasing the budget for education automatically translates into higher or better educational outputs. This view ignores the possibility that certain government delivery systems may be so inefficient that they can quite easily absorb vast additional inputs (much like a sponge) without there being any comparable increase in output. It also loses sight of the fact that pumping more resources into a health programme, for example, is not necessarily the only or the best way of increasing delivery or improving health outcomes. Evidence on the functioning of most government programmes would suggest that there is enormous scope for improving service levels in ways that would not require additional resources and could even save money.

Also implicit to the input interpretation of "progressive realisation" is the assumption that the programmes that are currently in place to promote socio-economic rights are efficient and reach those most in need. It is assumed that these programmes should, therefore, be maintained - even expanded. Given the historical bias in the design and implementation of government programmes, nothing could be further from the truth. The process of re-orientating government departments, their budgets and programmes is far from complete. There is also absolutely no reason why the government's approach to promoting a particular right should remain static. Technology changes, delivery methods evolve with experience, problems change and some programmes simply do not work in practice or experience diminishing returns over time. What government is currently doing is not necessarily appropriate for the future. If a government is to govern it must be free to continuously seek ways to improve service delivery. This may involve changing course, reprioritising expenditures, phasing out programmes and bringing in new ones.

Focus on outputs and outcomes

Another approach to interpreting "progressive realisation" is to focus on programme outputs and policy outcomes. Instead of asking how much money was spent on the housing programme, one should ask how many houses were built and how many people still do not have access to adequate housing. Similarly, in education the focus should be on the number of successful matriculants (while maintaining standards) and improvements in literacy levels rather than education budgets or the pupil-teacher ratio. This approach requires the government to be far more transparent about what it is doing to fulfil the socio-economic rights. To start with, government will have to delineate policies that prioritise specific outcomes. It will have to develop and implement programmes in which the outputs contribute directly to meeting these outcomes.

Requiring measurable objectives also forces accountability. At present, a manager responsible for a budget of R10 million for rural water provision is 'off-the-hook' if she can show that the correct administrative procedures were followed to appropriate the funds even though actual delivery was very inefficient. By contrast a manager responsible for a budget of R10 million for bringing water to 10 000 rural households has to ensure that the funds are appropriated correctly and spent efficiently. Focusing on outputs and outcomes also requires government to put systems in place to monitor and measure the performance of programmes. At the end of the day, government departments must be required to evaluate whether the outputs being produced are contributing effectively and efficiently to the realisation of policy outcomes.

Putting in place systems to measure outputs is essential for effective planning, budgeting and implementation management. Secondly, they are essential for enforcing managerial accountability. Thirdly, an integral part of the government's social contract with the electorate is that it reports regularly on its performance in relation to its constitutional obligations and the manifesto on which it was elected. This is only possible if it has collected the requisite information.

An output/outcome understanding of "progressive realisation" also recognises that socio-economic rights can be fulfilled in a variety of ways. For instance, to fulfil the right of access to adequate housing the government could build houses itself, pay grants to individuals to build houses for themselves, pay the private sector to build houses, or just provide serviced sites on which people are expected to build their own houses. The government may even choose the more hands-off approach of just ensuring that the market does not discriminate on unreasonable grounds against people wanting to access housing.

Whatever approach the government adopts, the outcome focus lead us to evaluate the results:

a. How many more people are being housed each year as a result of the government's actions?
b. What is the cost of providing access to each additional housing unit?
c. How could the government do better, given existing socio-economic circumstances?

A White Paper on Budget Reform

It is encouraging to note that the government is moving towards an output/outcome focus. The Department of Finance has explicitly stated that, building on current initiatives, the "emphasis will increasingly fall on the links between spending, service delivery and the outputs for which departments are

responsible" (*Budget Review 1999*, p117). The long-awaited White Paper on budget reform will be critical in enforcing greater focus on outputs. In doing so, it is expected to set out a framework for greater devolution of responsibility to departments over the allocation of resources, the management of their personnel and other inputs to improve service delivery. Hence, instead of departments merely accounting for the correct appropriation of resources, they will have to account for the efficiency of service delivery as well.

To sum up, an output/outcome interpretation of "progressive realisation" places a positive obligation on government to measure and report on its performance in every area of service delivery. This will provide civil society (as well as the Courts) with the information they require to monitor and evaluate the government's performance in achieving the "progressive realisation" of the various socio-economic rights. It will also provide the basis on which government can be challenged, especially in areas where it is not performing. Finally, the output/outcome approach also places the focus on delivery efficiency and programme effectiveness - both essential to achieving ongoing and sustainable improvements in socio-economic rights.

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Gender-Based Violence

A Barrier To Women's Enjoyment Of Economic And Social Rights

by Sharita Samuel

Several years ago we were still debating whether gender-based violence was an economic or a workplace issue. Fortunately that debate is now over. We now know that when violence, or the threat of it occurs, then the fear and anticipation can diminish the victim's ability to be productive.

Just as research indicates that lack of education affects work and lack of adequate housing affects health, it is time to acknowledge that gender-based violence is an obstacle to women's development. It consistently undermines the capacity of women to access other fundamental rights - such as housing, education, employment and social pensions. The prevalence and escalation of gender-based violence poses a threat to women's economic rights and their contributions to the economy. This is exacerbated by the fact that it is unconsciously condoned by many in our society. Women's contribution to the economy is a contentious issue especially in view of the seeming lack of value attached to their contributions. For these reasons, it is crucial to give fresh thought to addressing the issue.

Gender-based violence is without doubt rooted in inequality and women's subordination. The preamble to the UN Declaration on the Elimination of Violence against Women (UN Doc A/48/49, 1993), clearly locates the roots of gender-based violence in "historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, recognising that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men" (para.6 of the Preamble).

The concept of gender-based violence in this Declaration appears to be a broad one. It is not confined only to the actual use of physical force, but implies the right to inquire into all forms of action which disempower women because of the fear of violence - whether the fear is instilled by the State, actors in the community, or members of the family.

The burden of poverty

Increasingly the burden of poverty is becoming the responsibility of women and children. Despite this, the struggle to advance women's rights to socio-economic rights is taking place in a society which still considers and treats them as secondary citizens and their work of diminished economic value. This is notwithstanding the fact that women account for a significant portion of the informal economy through activities such as farm labour, selling produce in the street, weaving, embroidery and sewing. This is over and above bearing the brunt of household chores, managing household resources and maintaining family welfare. This clearly indicates that women are active in both community and household efforts to escape poverty. But their economic contributions are rarely measured. It is vital that we nurture women's potential to contribute to economic growth and protect the social and economic gains made by women in recent years.

By ignoring the havoc and strain that violence is wreaking on women, we are destroying the possibility of equity and any hope that all in South Africa will contribute and benefit equally from a healthy economy and society. If we continue evaluating persons living in poverty strictly on the basis of economic criteria, we will be perpetuating the error of failing to adopt a comprehensive approach. It is only through holistic solutions that we will succeed in reducing poverty in our country. We are consistently ignoring the toll of gender-based violence and the maltreatment of women in our planning and policy making. If we begin addressing issues of poverty and nation building from a holistic perspective and investing in women, we will reap the benefits of a healthy economy in which every woman and man is at liberty to participate freely without fear and intimidation.

The theme of poverty and violence is an old phenomenon that has appeared in women's community strategies worldwide. It is very often the struggle against violence that has encouraged women to fight with greater strength for political, social and economic rights. At present women are so fearful of their safety that many are not performing at optimum levels, especially since the lack of State protection is a sad reality. This obviously perpetuates the burden of poverty on women by preventing their access to basic social services, thereby stifling their economic and social opportunities.

Fear and its consequences

As the UN Special Rapporteur on Violence Against Women noted to the Commission on Human Rights:

Fear is perhaps the greatest consequence. Fear of violence prevents many women from living independent lives. Fear curtails their movements, so that women in many parts of the world do not venture out alone. Fear requires that they dress in a manner that is 'unprovocative' so that no-one can say that they asked for it if they are assaulted. This can result in a situation of vulnerability and dependence which is not conducive to women's empowerment. This leads to

women's potential remaining unrealised and energies which could be directed positively are often stifled.

Fear has a profound effect on all of us. It affects our ability to concentrate and be productive. But a victim's fear is particularly unique and profound. It is frequently misunderstood not only by males, but by other females who have had no similar personal experience. As a result, a woman may be reluctant to report a threat or an attack. It is in this context that gender based violence is linked to inequality in the economic, cultural and social spheres.

We must respond constructively to the fact that women's participation in the development process, especially in such areas as family planning, environmental protection and education, is crucial. Yet when women are faced with violence their ability to participate fully is hampered. In many communities husbands physically resist women's work outside the home since they fear this may lead to women's empowerment.

Another facet is the negative impact and financial burden of violence on the national health budget. This is just one more reason to adopt an integrated perspective. According to a report of the Global Commission on Women's Health, in addition to mortality, violence leads to psychological trauma, depression, substance abuse, injuries, sexually transmitted diseases and HIV infection, suicide and murder (World Health Organisation, Violence Against Women: A Priority Health Issue, July 1997). This is a monumental strain on the health budget and consequently the economy, obviously reducing resources that could be better utilised elsewhere.

The impact of violence on women's right to work

Violence does not only affect a woman outside the workplace. It also interferes with a woman's ability to get, perform or keep a job. This consequently affects her financial status, security and stability. The effects of violence are associated with many direct and indirect costs to the workplace such as decreased productivity, increased health care costs, absenteeism, errors, time spent coping with problems. Whether or not employers know it or acknowledge it, violence against women does not disappear when women leave home and enter the workplace.

Although a society may eventually quantify its economic loss due to gender based violence, but how can it ever calculate the loss it suffers due to the fact that women are not safe and that their freedom is restricted?

Therefore for working women (especially in the informal sector), violence can further weaken their financial security by compromising their ability to perform and keep their jobs. This clearly indicates that, in addition to the human and social cost of family violence, there is a huge economic cost to individuals, the society and economy.

Towards meeting the challenge

An essential step in combating violence against women is to take away any excuse that it might be legitimate. Role-players must realise that we cannot truly advance our ideals and interests unless we focus more attention on the fundamental human rights and basic needs of women. It is a well known fact that

if women can live and work as full partners in any society, then families will flourish. And when families flourish then communities and nations will thrive.

We can start by highlighting the importance of women's contributions to national economies as workers, entrepreneurs and household managers and identify the barriers that continue to constrain women's contributions. Once our society learns to value its women citizens and attaches some worth to their contributions it will realise that the empowerment of women is the key to social transformation. Is this so impossible in the light of all the safeguards that have been entrenched by our Bill of Rights?

Perhaps this will lead to the further understanding that poverty affects men and women differently. In addition to dealing with the burden of poverty, women have to contend with a more silent and stealthy form of discrimination - that of fear and intimidation due to violence in the family, community and in society. This is discrimination which men, even poor men, do not endure in the same way.

Gender based violence cannot be solved by isolated and fragmented strategies but must be addressed in a comprehensive and integrated way. Legal reform alone is not enough. If changes to the law are not accompanied by attitudinal changes at every point, little will have been accomplished for victims. We need to change the attitudes of police, prosecutors, magistrates, judges and health workers. Therefore co-ordination is essential. The good intentions and sound policies of any government department are of no value unless all elements of the system work together. For example, police have negative attitudes to arresting suspects when they believe prosecutors do not aggressively seek convictions. This vicious cycle is also perpetuated by prosecutors who are hamstrung when police do not file complete reports and fail to gather supporting evidence. Magistrates can and often do undermine prosecutors by failing to impose meaningful sentences.

Breaking the chain of inaction

Changes in attitudes are critical. Our experience on the ground shows that efforts to extend legal protections to women have been hampered by the reluctance of magistrates, police and prosecutors to recognise the magnitude of the harm and to accept the validity of the claims. This chain of inaction needs to be broken. The tremendous efforts and achievements of NGOs in this field need to be incorporated holistically into implementation plans to combat this problem. Concerted, but nevertheless fragmented efforts, will come to naught unless all arms of government co-operate in their efforts..

In her speech before the Commission on Human Rights, the Special Rapporteur on Violence against Women noted that perhaps the greatest cause of violence against women is government inaction with regard to crimes of violence against women. There appears to be a permissive attitude, a tolerance of violence against women. Even where crimes of violence against women are recognised in the law, they are rarely prosecuted with vigour. This is perhaps partly due to the fact that in the past a strict interpretation of human rights has led to the belief that the State can only be held responsible for violations of human rights by its employees or agents

The Special Rapporteur's analysis of the State's obligations in the light of various international instruments has highlighted the possibility of holding the State

accountable for violations committed by non-state actors, including private individuals.

Article 3 of the International Covenant on Economic, Social and Cultural Rights guarantees the equal right of men and women to the enjoyment of all rights set forth in that Covenant. Many of the substantive rights set out in the Covenant cannot be enjoyed by women if gender-based violence is widespread.

General Recommendation No. 19 adopted in 1992 by the UN Committee on the Elimination of All Forms of Discrimination Against Women under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) deals entirely with violence against women. This General Recommendation explicitly states that gender-based violence is a form of discrimination which seriously inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men. It calls on States parties to take this form of discrimination into account when reviewing their laws and policies.

General Recommendation 19 argues that certain traditions, customs and practices whereby women are regarded as subordinate or as having stereotyped roles perpetuate various practices, including violence and coercion. Such prejudices and beliefs may be used to justify gender-based violence as a form of protection of or control over women, as a result of which women are deprived of the equal enjoyment of their human rights and fundamental freedoms.

In the context of the above norms established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women.

Surely we do not require our obligations to be more clearly spelt out? Are we going to continue to sanction gender-based violence with its restriction on women's development? Or will all role-players concede and acknowledge its toll on our nations' progress? Let us act on the knowledge that investing in women leads to lasting economic growth, improved family welfare and a reduction in poverty - thus making possible a more equitable distribution of the socio-economic benefits of development. Many of the mechanisms are already in place. The process can only be enhanced by a sincere understanding of the value of women to the nation and unbiased efforts to end the violation of women.

It is imperative that we take our heightened national awareness on the subject and the successful advances of women's organisations a step further by using them as tools to improve the quality of women's lives. This will enable them to enjoy the full benefits of citizenship as envisaged in our Bill of Rights. Let everyone be in no doubt that the eradication of gender-based violence is essential for the further empowerment of women, for improved family and community welfare, and ultimately for the eradication of poverty in this country.

The battle has transcended the moral imperatives that drove campaigns for a long while. Now frankly it is the smart thing to do in view of all the evidence confronting us.

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Notification Of Aids And Health Rights

by Karrisha Pillay

In April this year, the Department of Health issued draft regulations which propose making AIDS a notifiable disease (Draft Regulation R 485, 23rd April 1999). The regulations provide that when a medical practitioner or any other person duly competent to diagnose and treat a person with regard to notifiable medical conditions, diagnoses the Acquired Immuno-Deficiency Syndrome (AIDS) the person who performs the diagnosis must:

- inform the immediate family members and the people who are giving care to the person, and
- in cases of an AIDS death, the person responsible for the preparation of the body of this person.

Section 3(1)(b) of the regulations also requires that the person performing the diagnosis notify the office of the health section or any appropriate section of the local authority concerned of the AIDS diagnosis (hereafter referred to as State notification).

The motivation behind the regulations are three-fold: Notification is required to -

1. provide data to track the epidemic, prioritise interventions and evaluate the epidemic;
2. ensure partner notification and to stop the spread of the epidemic; and
3. ensure greater public visibility of the epidemic.

Although the Department of Health's commitment to preventing HIV transmission and addressing the extremely high rates of HIV/AIDS infection is welcomed, the proposed regulations raise concern about their implications for a range of constitutional rights. They potentially violate the right of access to health care services, the right to privacy, and the right to equality because of their disproportionate impact on women. This article will be limited to the implications of the proposed regulations for the right of access to health care services.

An enabling environment

The right of "access to" health care services in section 27 of the Constitution creates a duty on the part of the State to create an enabling environment for individuals to be able to access health care services.

On 12th October 1999, the Portfolio Committee on Health held public hearings around the proposed regulations. The Socio-Economic Rights Project, the Women's Legal Centre, the Treatment Action Campaign and the AIDS Law Project made submissions

The State will be failing in this duty to create an enabling environment for individuals to access health care services through its proposed notification to immediate family members and care-givers. People are likely to exclude themselves from the health system in fear of notification. Self-exclusion is also likely to occur because of the absence of any benefit (such as treatment and follow-up care) to the AIDS diagnosed person. Notification to immediate family members and care-givers is more likely to create an unsafe, insecure, threatening and ultimately *disabling* environment for individuals to access health care services.

It is suggested that the term "health care services" in section 27 of the Constitution refers to those health services that are necessary to ensure a state of complete physical, mental and social well-being. The definition would clearly include prevention, diagnosis and the treatment necessary for a person's well-being.

opposing the proposed regulations. The Minister of Health is expected to make a decision as to whether the regulations will in fact be adopted in the near future.

Copies of the joint submission prepared by the Socio-Economic Rights Project and the Women's Legal Centre can be obtained from our project administrator, Nazli Salie: Tel (021) 959 2950.

An effective prevention strategy

Contrary to the intended purpose of the regulations, they are unlikely to prevent the spread of AIDS for the following reasons:

- As the regulations require notification only upon AIDS diagnosis (as opposed to a person's HIV-positive status), it is more likely that sexual partners of the diagnosed person have already been infected.
- The value of notification to immediate family members and care-givers is largely questionable as AIDS cannot be casually transmitted.

Secondly, diagnosis, which is a fundamental aspect of the right of access to health care services, is unlikely to occur in the context of HIV and AIDS, should the regulations be adopted. For fear of notification, people will not want to be tested and diagnosed and therefore not voluntarily present themselves at health care facilities for these purposes.

Thirdly, notification would not necessarily result in any treatment or follow-up care to the AIDS diagnosed person. The absence of any benefit following diagnosis, is a further deterrent to voluntary testing. Instead, notification will divert resources away from treatment and into an ineffective prevention strategy.

Notification and use of available resources

Section 27(2) of the Constitution makes the right of access to health care services subject to resource availability. In realising the right of access to health care services, it is vital that the available resources are effectively and equitably utilised. It is questionable as to whether notification does, indeed ensure that resources are effectively and equitably utilised.

It is argued that notification to the State is required to provide data to track the epidemic, prioritise interventions and evaluate the epidemic. However, acquiring data through notification does not warrant the expenditure of scarce resources for the following reasons:

- Notification is an extremely expensive way of acquiring data that is fraught with inaccuracies. For example, as the regulations make no provision for patient identification systems, notification in regard to a particular patient can occur more than once by several different health professionals.
- In addition, the data on notifiable diseases is often inaccurate due to limited co-operation from medical practitioners. In the case of other notifiable diseases, medical practitioners have been notorious for either failing to fill in the necessary forms or filling them in incorrectly.

Notification to immediate family members and care-givers places the additional burden on the health care professional to contact the relevant persons, inform them of the person's AIDS status, provide pre- and post test counselling, HIV testing, as well as follow-up care. Precious time and resources will again be diverted away from actual health care service delivery into contact tracing. Even if our severely cash-strapped health system could justify the use of time and resources for these purposes, its success is still largely dependent on the co-operation of the AIDS diagnosed person. For instance, the health care professional would not be able to fulfil their duties in this regard if the AIDS diagnosed person failed to provide the correct details of her/his immediate family members and care-givers.

Furthermore, this form of notification could potentially expose health care professionals to claims of civil liability from immediate family members and care-givers of persons diagnosed with AIDS, should they fail to notify the relevant persons. These claims will divert yet more resources away from health care service delivery and amount to an inefficient use of available resources.

Reasonable legislative and other measures

Section 27(2) of the Constitution obliges the State to take "reasonable legislative and other measures" to advance the right of access to health care services. Given the limited value of notification to the State as a means of collecting accurate data as well as the high costs thereof, it is highly questionable whether notification to the State does in fact constitute a "reasonable" measure.

Immediate family members and persons giving care to the AIDS diagnosed patient often constitute an important support structure to the person suffering from AIDS-related complications. Notification to immediate family members and care-givers may threaten an important source of emotional, financial and other support for a person living with AIDS. In addition, its limited preventative value further supports the argument that notification to immediate family members and care-givers does not constitute a reasonable measure on the part of the State.

Alternative proposals

In its submission to the Ministry of Health on the proposed regulations, the Socio-Economic Rights Project at the Community Law Centre and the Women's Legal Centre accordingly proposed that the draft regulations be abandoned. Whilst the State should remain committed to the objectives underlying the regulations, more efficient and cost-effective strategies to achieve those objectives should be considered.

The Socio-Economic Rights Project and the Women's Legal Centre made the following proposals in their submission:

- Counselling and encouragement to the HIV diagnosed person to disclose his/her HIV- status to sexual partners where there is a substantial risk of harm arising from non- disclosure;
- Health care professionals undertake non-consensual disclosure only in cases where the HIV diagnosed person refuses to make such disclosure, and:
- where there is a substantial risk of harm; and
- after a risk assessment of domestic violence has occurred.
- Education, information and awareness strategies aimed at HIV prevention.
- The use of additional sentinel sites to test for HIV/AIDS and track the epidemic. Sentinel sites are specific locations for the systematic collection and testing of blood from selected populations. For example, pregnant women attending antenatal clinics is a sentinel site used for the purpose of identifying trends in HIV prevalence over time.

A Plan To Fulfil The Right To Education

by Lawrence Mashava

One of the most devastating legacies of apartheid is illiteracy. Bantu education was implemented to ensure that the majority of South Africans would not be in a position to aspire to certain stations in life. In order to achieve the desired result the government spent most of the education budget on the minority. The repercussions are still being felt today.

Millions of South Africans are functionally illiterate. In figures this translates into one in four South Africans who cannot read or write. There are more who are unable to effectively use whatever semblance of reading or writing skills they do have (see *Poverty and Human Rights*, Report of the National "Speak Out on Poverty Hearings": 31). The new government has been determined to eradicate illiteracy, and ensure that everyone is able to enjoy quality education.

During his first address as the new Minister of Education, Prof. Kader Asmal identified a number of areas where the government was failing with regard to education. Some of these areas are:

- *Rampant inequality*

He stated that there is inequality in access to educational institutions of a satisfactory standard. The majority of the poor (who are mostly rural black people) continue to attend schools that are decrepit with no basic amenities such as water, sanitation, electricity and books. Most of the parents of the children who attend these schools are poor and illiterate and so the cycle of poverty repeats itself.

- *Failures of governance and management*

He highlighted the serious lack of leadership, governance, management and administration in many parts of the education system. Most provincial education departments (PEDs) are unable to perform the tasks laid down for them in legislation. The results are fraud, corruption and a lack of discipline in institutions of learning.

- *Poor quality of learning*

He noted that the above-mentioned shortcomings in the education system have resulted in poor quality of learning. This has contributed to South Africa faring badly in the international standardised tests on mathematics and science. The shocking results of the Senior Certificate at the end of 1998 highlighted the extent to which the education crisis has deepened.

The constitutional implications

These shortcomings must be seen in light of the constitutional obligations on the State in relation to education. Section 29(1)(a) of the 1996 Constitution guarantees to everyone the right to basic education and adult basic education. In order for this right to be fulfilled the State has to build schools with the necessary amenities and also ensure that there is proper management of these schools.

The need to build schools has been recognised by the South African Schools Act (No. 84 of 1996) which places a duty on the Minister of Education to build schools in order for learners to receive a basic education (s 3(3)). Furthermore, the right in s 29(1)(a) is not limited to ensuring that everyone gets to go to school. Once they are there, they must also receive quality education (see R. Kriel "Education" in M. Chaskalson and others *Constitutional Law of South Africa*, Juta & Co, 1998 Revised Edition: p. 38-2).

It is clear that if the situation as identified by the Minister persists that this would amount to a violation of the right to education as enshrined in s 29(1)(a) of the Constitution. It is therefore essential to address these shortcomings. This will not only protect the right, but also redress the situation of illiteracy created by apartheid.

Minister Asmal's Plan

In the same address referred to above, the Minister also introduced his plan for addressing these problems. The plan is in the form of priorities that he has set for his department to achieve. The priorities extend beyond the right to basic education. I will only focus on those dealing with basic education and adult basic education. However, the plan can clearly not be seen in a disjointed manner. It forms a comprehensive list of priorities for redressing the crisis in the South African education system.

- *Making the provincial government system work*

The first priority is to make the provincial government system work. This is to be done by making co-operative government work. As stated above, part of the problem is the failure of governance and management in the education sector. The Minister will exercise his political authority vigorously within the limits imposed by the Constitution in order to address this problem.

The PEDs need to be responsible in their allocation and management of funds. This will require careful assessment of the personnel and non-personnel needs in schools. Budgetary allocations will be discussed with the Minister of Finance at the national level and his counterparts at the provincial level, and the MECs for Education.

One of the current problems in South Africa has been the allocation of funds for personnel and non-personnel costs. Currently personnel costs are estimated to be at 90% of the education budget, whereas non-personnel costs are only 10% of the budget. International evidence shows that the proper ratio should be 80:20. The goal set in South Africa is 85:15 (see *National Norms and Standards for School Funding*, 1998: para. 25-26). According to the *National Norms and Standards for School Funding*, PEDs will be required to create databases on the funding to the schools in their region for each year. This is to ensure that schools

can themselves identify their costs. There is also a *Schools Register of Needs* to assess the needs of schools.

- *Breaking the back of illiteracy*

Another priority focus is to break the back of illiteracy amongst adults youths within five years. This priority is aimed largely at fulfilling the right to adult basic education. Through the Adult Basic Education Training (ABET) Programme the government hopes to ensure that those who were unable to receive education in the past because of lack of means or opportunities can overcome their disadvantage. According to the Minister the ABET should be able to ensure that a million people receive the equivalent of a grade 9 education by the year 2003.

People who receive qualifications from the ABET will be credited within the National Qualifications Framework (NQF). This will enable the individuals concerned to proceed with formal education.

Budgetary pressure has resulted in most PEDs cutting funding for ABET Programmes. New methods have to be devised to deal with the shortage of funds. The Minister has identified two ways to keep ABET Programmes running smoothly. The first is to encourage employers to run or support ABET Programmes for their employees. Secondly, to "stimulate the civic virtue of voluntary service, in support of our illiterate compatriots". This would require, for example, students to do community service by giving literacy classes to those in ABET Programmes.

- *Schools as centres of community life*

The current state of squalor and degradation in which most schools in South Africa find themselves can only be addressed through the allocation of more funds. The amount allocated by the government for the National School Building Programme is insufficient and alternative funding has to be found. There also needs to be a process of identifying those areas and schools that are in most need of improvement and to focus on them.

The Minister's vision is that schools become centres of community life. This requires that the learners and the community use them for extra-mural activities. Communities should reclaim schools as an integral part of communal life. Communities will only protect and maintain the schools once they realise that they belong to them. A culture of peaceful settlement of disputes in schools needs to be established. The approach of corporal punishment is rejected in favour of alternative means of discipline.

- *Outcomes-based education and a professional teaching ethos*

Another aim of the Ministry is to ensure the success of active learning through outcomes based education and developing the professional quality of the teaching force.

Outcomes based education (OBE) is the current policy of the education department. It is aimed at cultivating the capacity of students to think and to learn from the environment. This requires that teachers value creativity and self-motivated learning. In order for the policy to succeed there needs to be better delivery in learning support material.

The teaching force has to be motivated and their morale uplifted. This requires that they receive effective professional support services. The current inequalities in learner-educator ratios have to be addressed. More learning support materials also needs to be made available.

The plan is well thought out and is aimed at addressing the real issues confronting the education system in South Africa. The key challenge is implementation of the plan in letter and in spirit. According to the Ministry of Education the implementation process is already underway: for example, the indicators for measuring the efficiency of the performance of PEDs are being drafted. The plan should go a long way to ensuring the protection of the right to basic and adult basic education in the Constitution.

Cases

by Sandra Liebenberg and Steve Kahanowitz

A. Judgment in Vanessa Ross v South Peninsula Municipality High Court (Cape of Good Hope Provincial Division) Case No. A 741/98 (3 September 1999), unreported

In the last edition of *ESR Review*, we discussed the arguments presented in the above case before the Cape High Court on 29 May 1999 (see vol. 2, no. 1, July 1999, *Challenging the Common Law of Evictions*, p. 16 - 17). Judgment in this case was delivered by Mr. Acting Justice Josman on 3 September 1999 (Justice Desai concurred in this judgment).

The South Peninsula Municipality were seeking an eviction order against Mrs. Ross and her children from the flat in Lotus River she had been leasing from the Municipality since early 1997. In their summons, the Municipality made three simple allegations:

1. It was the owner of the property;
2. Mrs Ross was in occupation of the property; and that
3. She and all the people living with her were occupying the property illegally as there was no agreement which entitled her to occupy the property.

Mrs. Ross's attorneys noted an exception to the summons on the basis that it did not disclose a valid cause of action under the Constitution, particularly in terms of section 26(3). This judgment is an appeal from the decision of the Magistrate's Court, dismissing the exception.

The municipality's form of pleading was in accordance with the common law principles established in the 1931 case of *Graham v Ridley* 1931 TPD 476. The owner of property is entitled to possession of the property. In an ejectment application, it is therefore sufficient for the owner simply to allege ownership of the property in question and that the respondent is in unlawful possession.

The main issue in this case was whether section 26(3) of the Constitution has altered these established common law principles. In other words, has the Constitution now placed an onus on an owner of land to inform the court of circumstances justifying the eviction of a person in possession of the owner's property if it is his or her home? Section 26(3), which forms an integral part of the right of access to adequate housing, reads as follows:

No-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The court held that it was beyond question that the incidence of the onus could be affected by a constitutional requirement. Experience and fairness would determine where the onus should be placed.

The plaintiff's duty to plead 'relevant circumstances'

In terms of section 26(3), a court can only grant an eviction order after it has considered *all* the 'relevant circumstances'. How should these circumstances be placed before the court? The court observed that in inquisitorial legal systems, a judicial officer is able to call for and gather whatever information is required. In adversarial systems, it is up to the parties to place the relevant information before the court. The onus of proof becomes very important in this context as it prescribes which party must place particular facts and circumstances before the court and therefore what has to be alleged in pleadings or affidavits.

The effect of section 26(3) in an adversarial legal system such as our own is that the plaintiff (owner) must place the information before the court that it considers relevant. The defendant (occupier) can plead by answering these allegations and can also raise additional issues that it considers relevant. The plaintiff can respond to any new allegations raised by the defendant in reply. In this way the pleadings will introduce the issues and define them, and the evidence will provide the substance and detail. In this way the court will be able to exercise its discretion after having considered all the relevant circumstances. The court itself could presumably also call for amplification of the issues if it deems it necessary.

Since the Constitution only protects eviction from a 'home', section 26(3) would not apply in the case of eviction from, for example, business premises.

Default Judgment Applications

Section 26(3) of the Constitution prescribes that an eviction order can only be made in terms of an order of court. This means that an eviction order may not be issued by, for example, a clerk of the Magistrate's Court or the Registrar of the High Court in an application for default judgment. Only the presiding officer can issue such an order and then only after considering all the relevant circumstances.

Where the defendant does not enter an appearance to defend and the plaintiff seeks judgment by default, the defendant would not have the opportunity to place facts before the court that it considers relevant. However, the plaintiff would still bear the burden of alleging and proving the 'relevant circumstances' that would justify the court in granting an eviction order. However, less evidence would be required from a plaintiff in relation to knowledge which is peculiarly within the knowledge of the defendant.

What are 'relevant circumstances'?

The court held that it was beyond the scope of the appeal to consider what circumstances will be regarded as 'relevant' in an eviction context. However, it said that some guidance could be obtained from the provisions of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* (see, e.g.

section 4(6) and (7)). Of particular relevance was the legislature's concern that the rights of the elderly, children, disabled persons and households headed by women should be protected in an eviction context.

The court was not required to consider whether this Act was directly applicable to the circumstances of Mrs. Ross's case as the action against her commenced in 1997 before this legislation came into effect (i.e. 5 June 1998). It is thus a pity that the court chose to endorse the judgment of Schwartzman J in *Absa Bank Limited v Amod*(Witwatersrand Local Division, 23 February 1999) to the effect that this Act would not in any event have applied in the circumstances of Mrs. Ross's case. According to this judgment, the Act does not apply to an agreement of lease in which the owner seeks to recover possession of his/her property. It is confined to eviction applications in a situation where a person "has without any formality or right moved on to vacant land of another and constructed or occupied a building or structure thereon." (at 429(I)). The scope of application of this legislation requires full argument on its own merits. Its applicability to landlord and tenant situations was not canvassed in the arguments before the court in the Ross case.

However, the Act does provide useful guidelines as to what constitutes relevant circumstances in an eviction situation. The Court could also have referred in this regard to General Comment No. 7 (1997) adopted by the UN Committee on Economic, Social and Cultural Rights during its sixteenth session. This General Comment elaborates on aspects of the right to adequate housing protected in article 11 of the International Covenant on Economic, Social, and Cultural Rights. This important human rights treaty has been signed, but not yet ratified by South Africa. The General Comment deals specifically with the considerations that are relevant to forced evictions, and also highlights the need to provide special protection to disadvantaged and vulnerable groups (see e.g. paras. 11 and 17).

A fundamental change

This judgement is important as it affirms that section 26(3) of the Constitution has fundamentally changed the common law of evictions as laid down in Graham v Ridley. It is no longer sufficient for an owner of property in an eviction application to allege that persons who are occupying the property as their home are in illegal possession. The owner-plaintiff must allege and prove 'relevant circumstances' that would entitle it to an eviction order. The exact nature of the circumstances that the plaintiff must allege is still uncertain although some guidance can be obtained from the factors a court must have regard to in deciding whether it is 'just and equitable' to grant an order for eviction under the *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act*, 1998.

Section 26(3) thus appears to confer a broader equitable discretion on a court in a context where people are being evicted from their homes. This potentially represents a significant shift in the balance of power between landlords and tenants by providing greater protection to tenants against unfair, arbitrary evictions. However, the horizontal application of section 26(3) (i.e. where eviction is sought by a private landlord) is still undecided as the case dealt with an eviction action brought by an organ of State.

The Ross case highlights how socio-economic rights can alter the established common law and provide greater protection to vulnerable and disadvantaged groups.

B. Cape Killarney Property Investments (Pty) Ltd v F Mahamba & 2nd to 543rd Respondents High Court (Cape of Good Hope Provincial Division) Case No. 7318/99 (1 October 99), unreported.

A further important protection for tenants and occupiers facing eviction was considered in the above matter. Judgment was handed down by Deputy Judge President Hlope on 1 October 99. The applicants had approached Foxcroft J on 22 June 99 and been granted a *rule nisi* without any notice to the respondents. The respondents were given a month in which to show cause why a final order should not be granted for their eviction.

The applicants admitted on the papers that certain of the residents had been on the farm for up to 18 years. The respondents brought an application in terms of rule 6(12)(c) that Justice Foxcroft's order be reconsidered in view of non-compliance with both section 26(3) of the Constitution and the provisions of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998*.

Judge Hlope held that the *rule nisi* should not have been issued without notice having been given to the occupants in terms of section 4(2) of the above Act which requires that notice of an eviction application must be given at least 14 days before a hearing. As such notice was not given, the *rule nisi* granted by Foxcroft J was assailable on that ground again.

The section also required "written and effective notice". In this regard, Judge Hlope held that for it to be effective when "the overwhelming majority of the respondents are Xhosa speaking and many of them illiterate" the order should have been accompanied by a Xhosa translation thereof. Furthermore, because a substantial proportion of the occupants are illiterate, the applicant should have arranged for the contents of the order to be broadcast to them in Xhosa by a loudhailer throughout the community at certain times when many of the respondents would have been present. The *rule nisi* granted by Foxcroft was accordingly discharged with costs.

The LRC acted for respondents. An application for leave to appeal against this judgment is to be heard shortly.

C. Irene Grootboom and Others v the Oostenberg Municipality, Cape Metropolitan Council, The Premier of the Province of the Western Cape, National Housing Board and Government of the Republic of South Africa High Court (Cape of Good Hope Provincial Division) Case No: 6826/99

The applicants in this case were a number of persons who were evicted from private land in the jurisdiction of the Oostenberg Municipality where they had informally settled. As a result of the eviction, their building materials had been destroyed and they were left with no place where they could settle with some degree of security. They ended up squatting in appalling conditions on the periphery of the Wallacedene Sports Grounds.

An urgent application was brought on their behalf in the Cape High Court for a mandamus, directing one or more of the respondents to provide basic temporary shelter for the applicants and their children, pending them obtaining permanent accommodation. This was the main relief that was pursued by the applicants although an order had also been sought for the provision of basic nutrition, basic health care services and social services to the applicants' children. On 4 June

1999, Mr. Acting Justice Josman ordered temporary relief in the matter by requiring the respondents jointly and severally to accommodate the applicants' children, free of charge, in the Wallacedene Community Hall.

The application was argued in full before Justices Comrie and Davis on 7, 8 and 9 September 1999.

This case represents a major test case on the scope of the constitutional right of access to adequate housing (s 26(1) and (2)), and the right of every child to shelter (s 28(1)(c)). The major issue to be determined is whether one or more of the three spheres of government have a constitutional obligation to ensure that people in the applicants' position have at least temporary shelter, pending the taking of longer term measures to ensure the progressive realisation of their right of access to adequate housing. Applicants' counsel argued that this represented the minimum core duty imposed on the State by section 26 of the Constitution, and that it is also the unqualified right of every child in terms of section 28(1)(c) of the Constitution.

The respondents contested that such a minimum core duty could be read into section 26 of the Constitution. They also argued that the Child Care Amendment Act 96 of 1996 gave effect to the right of every child to shelter. 'Shelter' in this context means the temporary care of children in especially difficult circumstances, and does not extend to the provision of temporary accommodation for homeless families such as those in the applicants' position.

A noteworthy feature of the arguments presented by the applicants in this case was their reliance on international human rights law to interpret the scope of the relevant socio-economic rights in the South African Bill of Rights. Counsel referred particularly to the International Covenant on Economic, Social and Cultural Rights (1966), the General Comments issued by the Committee on Economic, Social and Cultural Rights under this Covenant, as well as the Convention on the Rights of the Child (1989).

This case is an important test case on the scope of the positive duties imposed on relevant organs of State by the socio-economic rights in the Constitution. The judgment will be crucial in the slowly unfolding jurisprudence on socio-economic rights, and will have significant implications for litigation strategies in South Africa relating to these rights.

Judgment in the matter was reserved, and has not been delivered at the date of writing. The project will aim to feature the judgment in the next edition of ESR Review.

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Monitoring Socio-Economic Rights

The SA Human Rights Commission's Second Annual Cycle

by Busi Sithole and Zandile Nkonyane

Section 184(3) of the Constitution obliges the South African Human Rights Commission (the Commission) each year to request information from relevant

organs of State on measures taken by them to bring about the realisation of socio-economic rights. In pursuance of this mandate, the Commission published its report on the first cycle of monitoring of socio-economic rights in March 1999. The Commission is in the process of its second monitoring cycle in terms of section 184(3). The period that is being monitored by the Commission for the second cycle is March 1998 to April 1999.

The Development of Protocols for the 2nd Cycle

As part of the second cycle of monitoring and assessing the realisation of socio-economic rights, the Commission drafted its second monitoring instruments or questionnaires (referred to as 'protocols'). Dr. Richard Shillington, a consultant from Canada, joined the Commission on June 21 1999 and assisted in developing the protocols. He conducted an in-house workshop on the socio-economic rights protocols, and assisted in the development of indicators, appropriate methodology, and quantitative questions. He also advised on the development of information gathering and monitoring systems. Some of the data gathered from the internal workshop held on July 8 1999 was incorporated into the protocols.

The development of the protocols was meant to be inclusive, involving NGOs, government representatives and academics. However, due to a lack of financial resources, this could not happen. Therefore, the draft protocols were sent to a number of non-governmental organisations (nationally and internationally) for comments and suggestions. After further refinement, the protocols were sent to relevant government departments in the national and provincial levels of government on 6 August 1999.

In order to 'cast a wider net' for the purposes of the monitoring process, stakeholders such as organised local government (South African Local Government Association (SALGA) and its affiliates) were also targeted.

NGOs' access to information
Like the previous monitoring cycle, it appears that NGOs will not be given direct access to the responses provided by government departments, but will only have access to the composite report produced by the Commission.

Content and format of the protocols

While the first set of protocols were divided into nine sections, the protocols for the second cycle only had six sections dealing with different themes. The broad themes incorporated in the protocols to guide the monitoring of socio-economic rights are:

- Policy measures instituted by various departments that respect, protect, promote and fulfil socio-economic rights;
- Legislative measures instituted by various departments that respect, protect, promote and fulfil socio-economic rights;
- Definition and monitoring of the minimum standards established for the realisation of socio-economic rights;
- Budgetary measures instituted by various departments that respect, protect, promote and fulfil socio-economic rights.
- Assessing the outcomes of the measures taken;
- Additional information on the realisation of economic and social rights that has not been included in answers to other sections.

The themes were designed to assess the realisation of socio-economic rights for all groups, including socially and economically vulnerable groups such as people living in rural areas, informal settlements, homeless persons, female headed households, women, persons with disabilities, the elderly persons, persons with HIV/AIDS, children, and formerly disadvantaged groups.

An explanatory memorandum was prepared to accompany the protocols for the purpose of assisting government departments in drafting their responses. The explanatory memorandum sets out the Commission's mandate, explains certain concepts, and outlines the format of the responses. The departments were required to prepare and send the reports in both hard copies and disks format. In order to establish an understanding with government departments with regard to the future process of socio-economic rights monitoring, suggestions on the design, content and structure of the protocols were also elicited.

The rights targeted in the protocols

The socio-economic rights issues dealt with in the second set of protocols are:

- Housing
- Health care
- Water
- Education
- Environment
- Food
- Social Security and Social Assistance
- Land
- Sanitation
- The living conditions of prisoners

The rights not specifically referred to in section184 (3) were included in the protocols because the Bill of Rights confers the right to equality before the law and the right to equal protection and benefit of the law. Section 9(2) specifically says that equality "includes the full and equal enjoyment of all rights and freedoms." The Constitution also protects property rights, and places the State under a duty to take reasonable measures to enable citizens to gain equitable access to land (s 25). The right to sanitation is by implication encompassed in the right to an environment that is not harmful to one's health and well being (s 24). The socio-economic rights of prisoners are guaranteed in section 35(2)(e). The Commission regards it as part of its constitutional mandate to also monitor these rights.

The distribution process

In order to facilitate the monitoring process, letters were written to relevant Cabinet Ministers, Premiers and Director-Generals (DGs) in various government departments. The purpose of the letters was to inform government about the Commission's socio-economic rights monitoring process and to request them to provide the names of contact persons from the relevant departments who would liaise with the Commission on various issues pertaining to the protocols.

Provincial DGs were requested to distribute the protocols to the relevant departments. Follow-up telephone calls were made to confirm whether all the targeted persons had received the protocols. The contact persons were advised to

contact the Research and Documentation Department of the Commission if they required clarity on the content of the protocols.

During this follow-up process, the Commission discovered that most departments had not received the protocols. This was due to a number of problems. Some DGs delayed sending the protocols to the departments in time. Moreover, some of them were not aware of the fact that protocols had been sent and should be given immediate attention. In reaction to this, the Commission decided to fax and e-mail the protocols to those departments that had not received the protocols from their DGs. Consequently, some departments only received the protocols much later than expected. Nevertheless, the Commission has successfully managed to distribute the protocols to the relevant organs of state and government departments.

The departments have been given a period of two months to compile a report in response to the protocols. To date, all the departments have confirmed receipt of the protocols and the Commission is currently waiting for the responses which were due on October 6 1999. Some government departments have requested an extension for the submission of responses. However, only a few government departments have responded.

The second socio-economic rights report

Once the responses from government departments are received, the Commission will analyse the responses and make appropriate recommendations. The gathering of secondary research material is also under way. The socio-economic rights researchers are currently conducting research in order to complement the information expected from various government departments. The Commission is aiming to table its second report on socio-economic rights in March 2000.

In light of their experience thus far, the Commission has identified some of the weaknesses in the process. It plans to refine the monitoring process further in order to eliminate these weaknesses. There is a need for sharing information and ideas from government departments (national, provincial and local) in order for this process to be successful.

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An NGO Shadow Report On Socio-Economic Rights

by Gina Bekker

Socio-economic rights are protected in the South African Constitution in two ways: firstly, as judicially enforceable rights, and secondly, through monitoring by the South African Human Rights Commission (SAHRC). In terms of section 184(3) of the Constitution the SAHRC must require relevant organs of state, every year to provide them with information on the measures taken towards the realisation of the rights concerning housing, health care, food, water, social security, education and the environment.

The first monitoring cycle commenced in 1997. The Commission sent out protocols requesting information on the steps taken to realise these rights, to the various government departments at national, provincial and local level. These departments had to submit replies by February 1998. The Commission then set

about drafting its own report, which was tabled in Parliament in March 1999. The Commission's process during the first cycle allowed for only limited NGO input and has generally not stimulated much debate around socio-economic rights issues.

The Commission is now into its second reporting cycle. It has revised the protocols and sent them to the relevant organs of state. It hoped to receive replies to the protocols by mid-October 1999. A number of government departments had not replied by the cut off date and have been granted an extension until the end of October. The Commission is hoping to complete the evaluation of these responses by the end of the year.

During the first reporting cycle, the South African Human Rights Commission refused to make the responses of the organs of state available to NGOs until such time as it had completed its evaluation. Despite efforts to remedy this situation during the second round, the Commission has refused to change their stance. Individual government departments will be approached to make their responses available. At this stage, it is unclear how many of the departments will be willing to make this information available to NGOs.

Preparations for an NGO Shadow Report

At a conference co-organised by the Community Law Centre and the Legal Resources Centre during October 1999 the idea of the production of an NGO Shadow Report was mooted. The seminar was entitled *Giving Effect to Socio-Economic Rights: The Role of the Judiciary and Other Institutions* (see *ESR Review* vol. 1 no. 4, March 1999). The need for an NGO report emerged from concerns that civil society was to a large extent excluded from meaningfully participating in the Commission's process.

A follow up meeting with parties who had indicated an interest in participating in the process was hosted by the Centre for Human Rights at the University of Pretoria on 19 August 1999 to further explore the idea of the production of a Shadow Report. A further meeting is being planned in order to allow for broader NGO participation and to determine the scope of the report.

The aims of an NGO Shadow Report

It is hoped that the production of an NGO report will stimulate debate and provide a platform for the mobilisation of civil society around socio-economic rights issues. Socio-economic rights have an important status in the Constitution. They are recognised in the Bill of Rights as fully justiciable rights and furthermore are singled out as an area over which the SAHRC has a special mandate. However, not enough attention is focused on them despite the fact that South Africa is a country in which there are large social and economic disparities.

The NGO report can be used as an advocacy and lobbying tool for better and more effective implementation of socio-economic rights. There are a number of creative ways in which this can be done. For example, a shadow report can be used to:

- try and influence the budgetary allocations of government;
- advocate for policy and legislative changes on socio-economic rights issues;

- serve as an alternative source of information to that provided by the relevant organs of state;
- supplement the SAHRC's official report.

The possibility of linking the Shadow Report to other initiatives such as the *War on Poverty Forum* are also presently being explored.

In the long term, the report can form the foundation for an NGO shadow report to the Committee on Economic, Social and Cultural Rights (Committee), once South Africa ratifies the International Covenant on Economic, Social and Cultural Rights. In a previous edition of this review we saw how Canadian NGOs used the shadow report they had produced to provide the Committee with alternative information to that provided by the Canadian government (B. Porter, 'Socio-Economic Rights Advocacy-Using International Law' *ESR Review* vol. 2 no. 1, July 1999, p. 1).

The potential of an NGO Shadow Report should not be underestimated. It is an important opportunity for civil society to make their voice heard and to influence some of the decisions taken by government which have an impact on the basic needs of disadvantaged groups.

For further information on the Shadow Report contact:

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Food Security And Nutrition As Human Rights

International Consultative Conference

by Tseliso Thipanyane

The international consultative conference on *Food Security and Nutrition as Human Rights* was organised by the South African Human Rights Commission (SAHRC) with the financial and technical assistance of the United Nations Children's Fund (UNICEF). Some technical assistance was also provided by the World Alliance for Nutrition and Human Rights (WANAHR).

The conference was held in Johannesburg (Randburg) from 21 to 23 March 1999 and was attended by over 100 international and national participants. Among the international participants were Dr. Asbjorn Eide and Dr. Wenche Eide (WANAHR), Dr. Urban Johnson (UNICEF's Regional Representative for Central and Southern Africa), Dr. Flavio Valente from Brazil and Mr N Gopalaswami, the Secretary-General of the National Human Rights Commission of India. Several representatives from government, non-governmental organisations, and various UN agencies such as FAO and UNDP were also present.

Context

The context and considerations, which informed the conceptualisation of this conference, were the following:

The recognition of the right to an adequate standard of living, including food, housing and medical care in article 25 of the Universal Declaration of Human Rights (1948), and the subsequent protection of these rights in international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (1966) [hereafter, the ICESCR], the Convention on the Rights of the Child (1989) [hereafter, the CRC}.

The fact that, despite the adoption of the Universal Declaration of Human Rights more than fifty years ago and the subsequent adoption of other international human rights treaties like the ICESR and the CRC, the right to food is not enjoyed by many people. Indeed, millions of adults and children suffer from hunger and many die from starvation and diseases related to malnutrition.

Despite numerous international measures like the World Summit for Children (1990), the International Conference on Nutrition (1992), the World Food Summit (1996) and the Symposium on Human Development and Human Rights (1998) intended to promote and protect the right to food, many people continue to be ravaged by hunger and related diseases. The South African Constitution protects the right of access to sufficient food (s 27(1)(b)), the right of every child to basic nutrition (s 28(1)(c)), and the right of detained persons to adequate nutrition (s 28(2)(e)) in its Bill of Rights. It also gives the South African Human Rights Commission a key role in monitoring and assessing the realisation of these rights and other related socio-economic rights.

The increasing interest and concern over the plight of the victims of poverty and the realisation of economic, social and cultural rights in South Africa. The National *Speak Out on Poverty* Hearings convened jointly by the South African Human Rights Commission, the Commission for Gender Equality and the South African Non-Governmental Organisations Coalition (SANGOCO) was an example of this interest.

Expected Outcomes

The three main expected outcomes of the conference were:

a. The development of a common working interpretation of key concepts related to food security and nutrition as human rights;
b. The development of appropriate and human rights centred strategies for the promotion of the right to nutrition;
c. The establishment of partnerships and alliances for the promotion of the right to nutrition.

Format

The conference was structured so as to facilitate the sharing of ideas and discussions around relevant and appropriate strategies in a dynamic, result-oriented atmosphere. Inputs by national and international experts served as a basis for discussions and the realisation of the conference's objectives. There were also complementary case studies on the Brazilian experience on mobilisation around food security, the judicial enforcement of these rights in India, and cases studies on how the rights to food security and nutrition were being promoted and protected in South Africa.

There were four workshop group discussions that discussed and made recommendations on how to advance the rights to food security and nutrition. The topics of the four groups were:

a. Concepts: Food security and nutrition as human rights;
b. Policy development and implementation: The role of government and civil society;
c. The impact of macro-economic policies;
d. Monitoring and assessment: The role of government, the judiciary, the South African Human Rights Commission and organs of civil society.

The recommendations of the group discussions were presented and discussed in the plenary session of the conference.

Some Key Recommendations

The following are some of the key recommendations that emerged from the working groups of the conference:

- A working definition of the concepts of food security and nutrition should be a starting point. The concepts should integrate the dimensions of health security, sustainability and a human rights approach.
- Current policies on food security and nutrition should be implemented with appropriate political will, but these policies must be flexible and adaptable.
- The process of policy development should be reviewed and should be more participatory and co-ordinated.
- There should be skills training on the implementation of policies pertaining to food security and nutrition.
- There should be joint proper co-ordination within government on food security issues.
- A co-ordinating body should be established convened by the Health Department. Food Security Desks should be established in each provincial premier's office. They would be responsible for the promotion of food security and the co-ordination of functions at a provincial level.
- GEAR (the growth, employment and redistribution strategy) should be interrogated in relation to its impact on government spending the and channelling of funds
- International agencies like the World Bank and the IMF need to be interrogated and influenced, where possible, on the impact of their policies on socio-economic rights.
- An inter-ministerial commission (similar to one established in Brazil) is needed to carry out an impact assessment of every government policy, including macro-economic polices.
- The SAHRC should enhance its ability to monitor the impact of macro-economic policies on socio-economic rights, particularly on food security and nutrition. For effective monitoring, further research and adequate information on the impact of these policies will be necessary.
- The SAHRC should understanding amongst members of the public and government on the impact of macro-economic policies on food security and nutrition.
- The SAHRC's protocols (questionnaires) in terms of section 184(3) of the Constitution should include requests for information on the following:
- The relevant organs of State that are primarily responsible for realising the food-related rights in the Constitution;

- Practical steps being taken by the Departments of Health and Agriculture to ensure that food is safe at all stages in the food chain;
- Measures taken by the Department of Welfare to ensure that children with disabilities and those living in rural areas have access to adequate food;
- The measures in place to ensure compliance with constitutional provisions and prevent violations, as well as the effectiveness of these measures;
- Mechanisms for co-ordination where two or more departments share similar responsibilities relating to food security and nutrition.
- A subcommittee should be created under the SAHRC whose key duties would include:
- Advocacy on a human rights-centred approach to food security and nutrition issues;
- Review of existing action plans including goals and targets;
- Development of social indicators;
- Review monitoring and evaluation mechanisms both within government and civil society.
- The realisation of food security and human rights in South Africa must be monitored and assessed against constitutional obligations, international human rights instruments (e.g. the World Food Plan of Action) and against the National Action Plan for the Promotion and Protection of Human Rights. Bodies to be monitored include all three spheres of government (national, provincial and local), parastatals, private enterprises, the World Bank, the IMF and SADC.
- Monitoring bodies like the SAHRC should be adequately resourced;

Plan of Action

Based on these recommendations the Conference adopted a Plan of Action set out in the following extract from the Conference Statement:

The Plan of Action:

Promote programmes for the elimination of malnutrition, starvation, hunger and associated diseases by developing a culture of human rights in our country by encouraging greater co-ordination and co-operation between all stakeholders and by encouraging dialogue and debate to address the problems pertaining to the rights to food security and nutrition. Encourage the efficient co-ordination of all efforts aimed at ensuring the promotion, protection and monitoring of rights pertaining to food security and nutrition. Ensure the respect for laws, regulations and policies designed to address food insecurity and lack of adequate nutrition and the implementation of appropriate mechanisms to monitor and implement them. Encourage the creation of a national or provincial office or community to oversee the realisation of the right to food. Empower communities, especially women, and relevant government officials to ensure effective systems to monitor and implement programmes for alleviating starvation, hunger and associated diseases.

THE CONFERENCE accordingly

Calls for a national resolve to place all resources at the disposal of a campaign to eliminate food insecurity and lack of adequate nutrition. To set in place measures to monitor and assess the implementation of such campaigns. Also to devise programmes to raise awareness and to train

the public and public servants about the problems pertaining to food security and nutrition. To devise strategies to address these issues effectively and efficiently, and in a collaborate effort between government, statutory bodies like the South African Human Rights Commission, civil society and the international community as represented by various UN agencies.

AND

Calls upon government departments to comply timeously with the South African Human Rights Commission's duty to fulfil its constitutional obligation to monitor social and economic rights in terms of Section 184(3) of the Constitution.

AND FURTHER

Calls upon the South African Human Rights Commission to co-ordinate the activities set out in this statement by providing information, monitoring, training, awareness raising and secure appropriate redress where the right to food security and nutrition have been violated.

Gauteng, 25 -27 March, 1999

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Communiqué

Concluding Observations on the African Commission on Human and Peoples' Rights and Economic Social and Cultural Rights Activism in Africa

On September 3-4, 1999, the Social and Economic Rights Action Center (SERAC), with the support of the J.D. and C.T. MacArthur Foundation and the Ford Foundation, organised a workshop, *Breathing Life Into Words: The African Commission on Human and Peoples' Rights and Social, Economic and Cultural Rights Activism in Africa* that united local and international human rights actors, the Secretariat of the African Commission, academics, journalists, legal experts, the National Human Rights Commission, slum community leaders, fisherfolk and other concerned groups to critically examine the status of economic, social and cultural (ESC) rights provisions of the African Charter on Human and Peoples' Rights. The workshop, convened in Lagos, Nigeria, was aimed to inspire local activism by heightening awareness about current imperatives while exploring strategies for strengthening the Commission's capacity to promote and protect ESC rights in Africa.

After two days of deliberations, the workshop participants unanimously issued the following concluding observations:

Introduction

1. Reflecting Africa's commitment to break from a legacy of massive and brutal abuses of human rights, the African Charter on Human and People's Rights came into force in October 1986 following ratification by a majority of African states members of the Organisation of African Unity (OAU). The entry into force of the Charter within a relatively short period of five years after its adoption signaled the changing face of the continent from a place where notorious and widespread repression had cast an ominous gloom over its future to an environment where express recognition of the dignity of the human person opened new vistas of hope for responsible governance in Africa.
2. Compared to similar regional human rights instruments, the African Charter charts new grounds in the protection of human rights in a number of key areas: (a) it expressly recognises the rights to development, peace and security; (b) grants special protections to the aged and disabled; (c) espouses a concept of peoples' rights and individual duties; and (d) firmly entrenches the principle of indivisibility, interdependence and interrelatedness of all human rights.
3. The Charter contains express recognition of several economic, social and cultural rights, including the right to work under equitable and satisfactory conditions; the right to the best attainable state of physical and mental health; the physical health of families alongside protections for women, children, the aged and the disabled; the right to education; the freedom to take part in the cultural life of his community; the right of all peoples to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind; and the right to a general satisfactory environment.

Factors Impeding the Full Realisation of Economic, Social and Cultural Rights Under the African Charter

1. Although the African Commission on Human and Peoples' Rights is the principal body mandated to monitor the implementation of the African Charter by States parties, it has failed to concretely engage the continent's important human rights problems and address Africa's pervasive ESC rights denials.
2. The marginalisation of ESC rights has served as a barrier to the actualisation of women's human rights and has had deleterious effects on the aged, disabled, children, and indigenous peoples.
3. Adverse policies and activities of international financial institutions and transnational corporations such as the World Bank Group, the International Monetary Fund, the African Development Bank, Mobil Oil and Shell Petroleum gravely undermine the enjoyment of ESC rights in Africa.
4. The absence of an expeditious and effective individual complaints procedure before the Commission has impeded the development of appropriate jurisprudence on human rights in general and economic, social and cultural rights in particular.
5. The virtual inaction of the Commission in the promotion and protection of ESC rights has been linked to the spatial presence of actors in that field of focus. In March 1997, for example, the Commission's Secretary noted that communications on economic social and cultural rights represent less than one per cent of the total communications so far received by the Commission. Moreover, human rights organizations and other actors have yet to optimize the important advantages of sharing their insights and experiences in order to formulate common perspectives and goals which could shape the Commission's understanding and agenda-setting on this subject. Consequently, ESC rights issues have been deferred on the

Commission's agenda, thereby augmenting States parties' indifference to their aggregate Charter obligations and fostering a culture of disrespect of human rights.

Recommendations

1. ESC rights should be permanently entrenched on the agenda of the Commission. Mindful of its longstanding passivity on ESC rights, the Commission should urgently appoint a Special Rapporteur on Economic, Social and Cultural Rights to understudy broad-based approaches and specific promotional and protective measures towards the full realisation of ESC rights.
2. The Commission should aggressively engage in constructive dialogue and strategic lobbying with States Parties, the OAU, other human rights monitoring bodies, human rights non-governmental organizations, donor agencies, international financial institutions, transnational corporations and other relevant actors towards the full implementation of the ESC rights guaranteed by the Charter.
3. All regional mechanisms relevant to the full realisation of ESC rights should be strengthened and the Commission should assume a key role in the collaboration and coordination of these measures. In particular, the Commission should be creative and imaginative in adapting its techniques and procedures to the promotion and protection of ESC rights.
4. As a reinforcement of that effort, the OAU should identify and provide critical resources that will strengthen the Commission's capacity to promote and protect ESC rights in Africa.
5. The enjoyment of ESC rights is key to the consolidation of democracy and arresting military coups on the continent.
6. The Commission should take immediate steps to ensure the domestic applicability of the African Charter by encouraging States parties to incorporate the African Charter into their municipal laws. Drawing inspiration from the Republic of South Africa, all States parties should make ESC rights constitutionally justiciable.
7. The Commission should be creative and imaginative in the interpretation of the African Charter and develop credible paradigms for measuring compliance of States parties with their ESC obligations. In this regard, the Commission should establish a minimum standard on States parties based on four layers of duties: (1) the duty to avoid deprivation; (2) the duty to protect from deprivation; (3) the duty to aid the deprived; and (4) the duty to resist deprivation.
8. All States party to the African Charter should work assiduously towards the institution of the African Court of Human Rights. Once established, the protective functions of the Commission should be transferred to the African Court of Human Rights.
9. In measuring States parties' ESC rights compliance, the Commission should adopt a budget analysis approach to assessing the adequacy of resource allocation to the protection and fulfilment of ESC rights. The Commission should urge States parties, international funding institutions, and public and private multinational organisations to allocate more resources towards the full realisation of ESC rights.
10. Corruption is in and of itself inimical to the realisation of ESC rights. The Commission should collaborate with national agencies to ensure the full recovery of stolen wealth from States parties' treasuries and should invite State parties to submit comprehensive reports to the Commission on its efforts to combat corruption and eradicate poverty. Concurrently, the

Commission should assemble a Working Group on Poverty to devise practicable steps towards the eradication of mass poverty in Africa.

11. The Commission should intervene in ongoing ESC rights struggles around the continent, particularly, of local communities and groups here present. Among such communities are the Maroko people (survivors of Nigeria's July 1990 forced eviction that claimed the homes of an estimated 300,000 persons), fisherfolk adversely affected by multinational petroleum corporations' oil spills, and Persons Living with HIV/AIDS.
12. The Commission should pay particular attention to the eradication of all forms of violence and discrimination against women, and to their overall economic, social and cultural advancement.
13. All human rights actors must develop relevant technical skills and capacity to analyse ESC rights issues and to continually challenge the Commission to act in the promotion and protection of ESC rights. Concerted efforts should be taken to develop effective techniques, including legal and non-legal strategies.
14. The Commission should continue to grant observer's status to non-governmental institutions as a means of fostering close collaborations with the human rights community.
15. The media must remain alive to its important responsibilities and dedicate itself to the wide dissemination of information on ESC rights.
16. The Commission is urged to widely disseminate the present communiqué following its consideration and adoption.

Gina Bekker of the Centre for Human Rights attended this workshop in Lagos on behalf of the Socio-Economic Rights Project.

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